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16 *[See Additional Counsel on Signature Page]*

17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 James Paul Mooney; and Lazy Coyote RV
20 Village, LLC, on behalf of themselves and
21 all others similarly situated,

22 Plaintiffs,

23 v.

24 Union Pacific Railroad Company,
25 successor to Southern Pacific
26 Transportation Company; SFPP, L.P.
27 (formerly known as Santa Fe Pacific
28 Pipelines, Inc., formerly known as
Southern Pacific Pipelines, Inc.); Kinder
Morgan Operating L.P. "D"; and Kinder
Morgan G.P., Inc.,

Defendants.

CLASS ACTION

LEAD CASE NO. 2:15-cv-01092-DGC
(Consolidated with Case No. 2:15-cv-
01380-DGC)

**PLAINTIFFS' MOTION TO
VACATE AND TEMPORARILY
SUSPEND ENTRY OF COURT'S
FEBRUARY 21, 2017 ORDER**

Honorable David G. Campbell

1 Pursuant to Federal Rule of Civil Procedure 1, Plaintiffs respectfully request that
2 this Court vacate and temporarily suspend entry of its February 21, 2017 Order (Doc.
3 260) relating to Plaintiffs' motion for class certification under Rule 23(b)(2) and (b)(3)
4 until it enters an order regarding Plaintiffs' motion for class certification under Rule
5 23(c)(4). This would permit a more efficient consolidated process for appeal pursuant to
6 Federal Rule of Civil Procedure 23(f) by one or more parties after the Court's
7 determination of certification under Rule 23(c)(4). Defendants do not oppose the
8 objective of facilitating simultaneous appeal schedules, but oppose the procedural
9 mechanism to accomplish that goal by vacating the Order.

10 On February 21, 2016, this Court entered an Order denying Plaintiffs' motion for
11 class certification under Rule 23(b)(2) and (b)(3). Doc. 260. Under Rule 23(f), Plaintiffs'
12 deadline to file a petition for permission to appeal is "14 days after the order is entered,"
13 which is March 7, 2016. Fed. R. Civ. P. 23(f). However, this Court is currently
14 considering whether to certify an issues class under Rule 23(c)(4). Doc. 260 at 1-2 & 33-
15 35. Thus, the deadlines to request permission to appeal by any party will be different for
16 the Court's ruling relating to Rule 23(c)(4) than the Court's Order regarding Rule
17 23(b)(2) and (b)(3).

18 Due to the staggered appellate deadlines, the Ninth Circuit will likely be faced
19 with multiple, piecemeal petitions for permission to appeal, which will unnecessarily
20 burden the Ninth Circuit with several briefs containing repetitive arguments. This
21 situation can be avoided entirely if this Court temporarily vacates its certification Order
22 relating to Rule 23(b)(2) and (b)(3) until it rules on Plaintiffs' request for certification
23 under Rule 23(c)(4), thereby synchronizing the appellate deadlines and allowing any
24 request for appeal under Rule 23(f) to be presented in a single petition or simultaneous
25 cross petitions.

26 A district court has inherent power to rescind, reconsider, or modify an
27 interlocutory order. *See United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000)

1 (noting that a district court has the inherent authority to modify, alter, or revoke any non-
2 final order); *see also* Fed. R. Civ. P. 54(b) (providing interlocutory orders “may be
3 revised at any time before the entry of a judgment adjudicating all claims and all the
4 parties’ rights and liabilities.”). Importantly, this Motion is not seeking reconsideration of
5 the Court’s February 21, 2017 Order, but simply for the Court to delay entry of the Order
6 until it enters an order relating to Plaintiffs’ motion for class certification under Rule
7 23(c)(4).

8 Additionally, Plaintiffs’ counsel contacted Defendants’ counsel regarding the
9 subject matter of this Motion. Counsel for Kinder Morgan indicated that Kinder Morgan
10 opposes vacating this Court’s Order but agrees with the concept of facilitating
11 simultaneous appeals if there are alternative procedural mechanisms to accomplish this
12 goal. Union Pacific’s position is in accord with Kinder Morgan’s position. Thus, all
13 parties agree with the purpose of this Motion. To that end, as a potential alternative to
14 vacating its Order, this Court could enter a separate order holding that its February 21,
15 2017 Order is being held in abeyance and is not to be entered until the Court rules on the
16 remainder of Plaintiffs’ class certification motion. Nonetheless, Plaintiffs are not seeking
17 to elevate form over substance, especially considering all parties agree on the aim of
18 establishing simultaneous appellate deadlines.

19 Accordingly, Plaintiffs respectfully request that this Court vacate its Order dated
20 February 21, 2017 (Doc. 260) until it rules on Plaintiffs’ motion for class certification
21 under Rule 23(c)(4). Alternatively, Plaintiffs respectfully request that this Court hold its
22 Order dated February 21, 2017 (Doc. 260) in abeyance until it rules on Plaintiffs’ motion
23 for class certification under Rule 23(c)(4).

Dated: March 2, 2017

Respectfully Submitted,

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Additional Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I hereby certify that, on March 2, 2017, I electronically filed the above and foregoing with the Clerk of Court using the CM/ECF system, which transmitted notice of the filing to all counsel of record.

/s/ Norman E. Siegel

Norman E. Siegel

CERTIFICATE OF CONFERENCE

I hereby certify that, on March 1, 2017, a lawyer from my firm contacted counsel for Defendants to inquire whether Defendants oppose the above motion. On March 2, 2017, counsel for Kinder Morgan stated that Kinder Morgan opposes any motion to “vacate or modify” the Court’s Order dated February 21, 2017 (Doc. 260); however, Kinder Morgan is “amenable to any reasonable mechanism that will allow the appellate issues to be handled simultaneously.” Also on March 2, 2017, counsel for Union Pacific responded that Union Pacific’s “position is in accord” with Kinder Morgan’s position.

/s/ Norman E. Siegel

Norman E. Siegel